S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HABAKKUK JOSHUA PAIGE,

Defendant-Appellant.

UNPUBLISHED
February 10, 2005

No. 250928
Macomb Circuit Court
LC No. 02-002207-FC

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (personal injury/force). Defendant was sentenced as a second habitual offender, MCL 769.10, to fourteen to forty years in prison. We affirm.

Defendant first argues that the verdict was against the great weight of the evidence, and the trial court should have granted his motion for new trial on that basis. We disagree.

On appeal, this Court reviews the trial court's grant or denial of a motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), rev'd in part on other grounds in *People v Lemmon*, 456 Mich 625, 647-648; 576 NW2d 129 (1998); *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *Herbert, supra* at 475. If there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder, *Lemmon, supra* at 642-643. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Leaving the question of credibility to the jury, defendant's conviction of first-degree criminal sexual conduct was not against the great weight of the evidence.

Defendant argues that the victim was inherently incredible for the reason that her testimony was inconsistent at trial. While defendant accurately points out discrepancies in the victim's testimony at trial from her statement to police regarding the timing of events, these were small differences which the victim explained as the result of mistake and the passage of time. Further, these discrepancies in the victim's testimony were minor matters compared to the problematic nature of defendant's testimony, in particular the contradiction of his testimony by

that of his friend, the fact that defendant's version of the story was unsupported by any other witness at trial, and the confused, contradictory and improbable nature of defendant's testimony. Additionally, we do not agree that the victim's testimony regarding the way the assault was accomplished was incredible.

We also disagree with defendant's claim that the verdict was not supported by sufficient evidence of personal injury. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational fact finder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

MCL 750.520b(1)(f) reads:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> The actor causes personal injury to the victim and forcer or coercion is used to accomplish sexual penetration. . . .

Thus, a defendant may be found guilty under MCL 750.520b(1)(f) if the defendant causes personal injury to the victim, engages in sexual penetration with the victim, and uses force or coercion to accomplish the sexual penetration. *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). Personal injury is defined in the statute as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(l). Physical injuries need not be permanent or substantial to qualify as personal injuries under the statute. *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). Scratches, bruises and tenderness are sufficient to sustain a first-degree criminal sexual conduct conviction on the theory of bodily injury. *People v Gwinn*, 111 Mich App 223, 239; 314 NW2d 562 (1981). If the evidence of either bodily injury or mental anguish is sufficient, then the element of personal injury has been proven. *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996).

Defendant does not challenge the elements of penetration or force or coercion, only the element of personal injury, asserting that there was no physical evidence of injury to the victim. With regard to personal injury, the nurse who examined the victim testified she located a bruise in the victim's labia minora and that the victim had tenderness on her right leg that extended across her inner thigh to the back of her leg. This evidence of bruising and tenderness, although not dramatic, was sufficient to support defendant's conviction of first-degree criminal sexual conduct on a theory of bodily injury. *Gwinn, supra* at 239.

Defendant next challenges the constitutionality of MCL 750.520b(1)(f) on the ground that it is void for vagueness. As defendant did not raise this issue in the trial court, it is not preserved for review. *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993). In addition, defendant does not cite any legal authority and provides no argument on

the issue. Defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999), aff'd 462 Mich 71; 611 NW2d 783 (2000), nor may he give issues cursory treatment with little or no citation of supporting authority, *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Because defendant failed to properly address the merits of the issue, we deem it abandoned and decline to address it. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant next contends that the trial court erred in excluding testimony by the nurse that the victim indicated to her that the victim had had consensual sexual intercourse within ninety-six hours of the examination by the nurse. We agree, but conclude that the error was harmless.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Michigan's rape shield law, MCL 750.520j(1), provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

The Michigan Rules of Evidence contain a parallel provision:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> * * *
>
> In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease . . . . [MRE 404(a)(3).]

These provisions embody the legislative policy decision that sexual conduct, as evidence of character and for impeachment, is not legally relevant. *People v Morse*, 231 Mich App 424, 429-430; 586 NW2d 555 (1998).

> The prohibitions in the law are also a reflection of the legislative determination that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. Avoidance of

> these dangers is a legitimate interest in the criminal trial process[.] [*People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982).]

However, the Michigan Supreme Court has held that under certain circumstances, the rape shield law could deny a defendant his constitutional right to confrontation. *People v Hackett*, 421 Mich 338, 347-348; 365 NW2d 120 (1984). In *Hackett*, the Michigan Supreme Court stated:

> By enacting a general exclusionary rule, the Legislature recognized that in the vast majority of cases, evidence of a rape victim's prior sexual conduct with others, and sexual reputation, when offered to prove that the conduct at issue was consensual or for general impeachment is inadmissible. The first purpose is simply a variation of character evidence as circumstantial evidence of conduct. The second is a collateral matter bearing only on general credibility as to which it has been held that cross-examination may be denied. The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [*Hackett, supra* at 347-349 (citations omitted).]

The Michigan Supreme Court in *Hackett* left the determination of the admissibility of such evidence to the sound discretion of the trial court. *Id.* at 349.

Under the plain language of MCL 750.520j, the nurse's testimony that the victim had consensual sexual intercourse was not admissible because it was not sexual conduct by the victim involving defendant and it was not offered to explain the existence of semen, pregnancy or disease. Defendant claims that, because he did not seek to introduce the evidence of the victim's prior sexual conduct for the purpose of proving that she consented to have sexual intercourse with him or as character evidence, but to provide an innocent explanation for the existence of the bruise in the victim's genitalia and of the tenderness of her thigh, the exclusion of the evidence denied him the right to confrontation. Defendant cites *People v Haley*, 153 Mich App 400; 395 NW2d 60 (1986), *People v Garvie*, 148 Mich App 444; 384 NW2d 796 (1986), and *People v Mikula*, 84 Mich App 108; 269 NW2d 195 (1978), for the proposition that when the prosecution substantiates its case against a defendant by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to present proof of the complainant's prior sexual activity tending to show that another person might have been responsible for her condition.

In *Haley*, the defendant was charged with criminal sexual conduct involving his eight-year-old niece. *Id*. at 402. At trial, the defendant sought to introduce evidence of prior sexual conduct of the complainant with her father to explain the complainant's knowledge of sexual matters. *Id*. at 402-403. This Court held that because the prosecution introduced evidence of penetration of the complainant, the defendant should have been allowed to introduce evidence of prior sexual abuse by the complainant's father to explain the evidence of penetration. *Haley, supra* at 406. In *Garvie*, the defendant was charged with sodomizing a seven-year-old boy. *Id*. at 446-447. The defendant sought to introduce evidence that the complainant had accused another person of sexual abuse to offer an explanation, other than the defendant's abuse of the complainant, for the complainant's depression. *Id*. at 447-448. This Court found that the trial court properly excluded the testimony for the reason that there was too great an intervening period between the possible assault by the other person and the change in the complainant's disposition. *Garvie, supra* at 449. In *Mikula*, the defendant was charged with criminal sexual conduct also involving a minor. *Id*. at 110. The defendant sought to introduce evidence of the complainant's prior sexual activity to explain the prosecution's evidence of penetration. *Id*. at 111-112. This Court held that the rape shield statute did not bar the admission of this evidence. *Mikula, supra* at 114-115.

In the instant case, defendant testified that he and the victim engaged in consensual sexual intercourse involving multiple penetrations for three to four hours two days before the alleged rape, and that they engaged in consensual sexual conduct again two days later, although he ejaculated before penetration. The nurse who described the victim's bruise testified that the bruise found in the victim's genitalia was not inconsistent with consensual intercourse. Defendant's testimony regarding the earlier encounter, if believed, makes the introduction of evidence that the victim had sexual intercourse with another party within ninety-six hours of her examination irrelevant as evidence of an innocent explanation of the bruise. Defendant's testimony of a prolonged session of sexual intercourse with the victim on June 13, 2002, provides an innocent explanation for the bruise. However, the victim denied that this encounter took place, and given defendant's friend's testimony, it is unlikely that the jury believed that defendant and the victim had consensual sex before the assault. The testimony regarding the statement that the victim had consensual sex within ninety-six hours of the exam was relevant to the element of personal injury. The victim's admission that she had had consensual sex within the preceding ninety-six hours, together with the nurse's testimony that the bruise could have happened during consensual sex, provided an alternative source of the bruise. The evidence should have been admitted as relevant to the degree of criminal sexual conduct involved. Nevertheless, we conclude that the error was harmless given that the victim testified that she had a boyfriend, that he stayed with her the night of the assault, and that jury obviously believed that defendant forcibly penetrated the victim to some degree.

Defendant's next claim, that his conviction should be reversed due to cumulative error at trial, is similarly without merit. The cumulative effect of several errors may warrant reversal of a conviction even if individual errors in the case would not. *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002). Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* This Court concludes, *supra*, that there were no prejudicial errors as claimed by defendant. Thus, there was no cumulative effect and defendant was not denied a fair trial. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002).

Finally, we disagree with defendant's last contention, that, under the holding in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), he should be resentenced for the reason that the trial court impermissibly increased his minimum sentence based on facts not found by the jury or admitted by defendant in violation of his constitutional right to trial by jury. The Michigan Supreme Court addressed the applicability of *Blakely* to Michigan's sentencing scheme in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), and concluded that Michigan's sentencing scheme was unaffected by *Blakely*. *Id.* at 730-731 n 14. Thus, defendant is not entitled to be resentenced on the ground that his minimum sentence was improperly enhanced by judicial factfinding in violation of defendant's right to trial by jury.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White